

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Meredith Corporation	)	
	)	CSR-7104-N
Petition For Waiver of Section 76.92(f)	)	
of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 12, 2007**

**Released: July 13, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Meredith Corporation, licensee of television broadcast station WFSB(TV), Hartford, Connecticut ("WFSB"), filed the above-captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication rules ("exclusivity rules").<sup>1</sup> Specifically, WFSB seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against WCBS-TV, New York, New York ("WCBS-TV").<sup>2</sup> WCBS-TV is considered to be significantly viewed in New Haven County, Connecticut, where the communities of Waterbury, New Haven, and Wallingford, Connecticut are located.<sup>3</sup> No oppositions to this petition have been received. For the reasons discussed below, we grant WFSB's waiver request.

**II. BACKGROUND**

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.<sup>4</sup> Under Sections 76.92(f) and 76.106(a) of the Commission's rules, however, a signal

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<sup>1</sup>47 C.F.R. §76.92(f). Although not expressly requested in WFSB's petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), a waiver of Section 76.122(j) (significantly viewed exception to satellite network nonduplication) would also appertain based on the same showing that a station is no longer significantly viewed in the relevant community. *See* 47 U.S.C. §§ 340(a)(2) and 340(c); 47 C.F.R. §§ 76.92(f), and 76.122(j).

<sup>2</sup>Petition at 1.

<sup>3</sup>*Id.* at 4. The community of Waterbury, Connecticut is served by the Adelphia/Tele-Media cable system. New Haven and Wallinford, Connecticut are served by Comcast.

<sup>4</sup>*See* 47 C.F.R. §§76.92 and 76.101.

otherwise subject to deletion is exempt from application of the exclusivity rules if it is “significantly viewed” in a relevant community (the “significantly viewed exception”).<sup>5</sup> The Commission’s rules generally provide stations such protection within a station’s 35-mile geographic zone.<sup>6</sup> The significantly viewed exception to the exclusivity rules is based on a demonstration that an otherwise distant station receives a “significant” level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community.

3. In the 2005 Report and Order implementing Section 340 of the Communications Act, the Commission adopted a rule for satellite carriage that mirrors the rules for cable carriage.<sup>7</sup> Accordingly, the amended Sections 76.122(a) and (j) and 76.123(a) and (k) of the Commission’s rules allow a station or distributor with exclusive rights to network or syndicated programming to assert exclusivity protection to require satellite carriers to delete such programming. The duplicating station may respond to such assertions by claiming the significantly viewed exception.<sup>8</sup> The party asserting exclusivity protection may request a waiver of the significantly viewed exception from the Commission by demonstrating that the station is no longer significantly viewed in a particular community or communities.<sup>9</sup> If the waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed. It should be noted that the station itself is not removed from the significantly viewed list and may continue to be carried, provided the necessary programming deletions are made.<sup>10</sup>

4. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, the Commission held in *KCST-TV, Inc.*<sup>11</sup> that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission’s rules.<sup>12</sup> Under Section 76.5(i) of the Commission’s rules, network stations<sup>13</sup> are

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<sup>5</sup> 47 C.F.R. §§ 76.92(f) and 76.106(a); *see* 47 C.F.R. §§ 76.5(i) and 76.54.

<sup>6</sup>The 35-mile geographic zone of all major markets and the 55-mile geographic zone around all smaller markets extend from the reference point of the community of license of the television station. These reference points are listed in Section 76.53 of the Commission’s rules. Where a community’s reference point is not given, the geographic coordinates of the main post office in the community shall be used. *See* 47 C.F.R. §§ 73.658 and 76.53.

<sup>7</sup>*Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) (“*SHVERA Significantly Viewed Report and Order*”).

<sup>8</sup>47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

<sup>9</sup>*See KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

<sup>10</sup>*See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 15 17295-26; *see also* 47 U.S.C. § 340(e)(2).

<sup>11</sup>103 FCC 2d 407 (1986).

<sup>12</sup> Section 76.54(b) describes the required survey procedures for adding a station to the significantly viewed list based on community or system-specific surveys. For the addition of a station to the list, only one year’s surveys are required. In *KCST-TV, Inc.*, the Commission required that the data demonstrate viewing levels for two years. In the *SHVERA Significantly Viewed Report and Order*, we clarified that the independent professional audience surveys required by Section 76.54 of our rules must include surveys only from households that receive broadcast signals via an over-the-air antenna and thus amended Section 76.54 to change “noncable” to “over-the-air.” *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 15 17292-23.

considered significantly viewed if the survey results show more than a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.<sup>14</sup> Independent stations (*i.e.*, non-network stations), are considered significantly viewed if the survey results show more than a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.<sup>15</sup> The Commission has found this test is also applicable for waivers of the syndicated exclusivity exemption.<sup>16</sup>

5. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking an exception to the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September."<sup>17</sup> Over time, Nielsen Media Research became the primary surveying organization through which a petitioner could obtain television surveys.<sup>18</sup> Nielsen, which routinely surveys television markets to obtain television stations' viewership, conducts four-week audience surveys four times a year (*i.e.*, February, May, July, and November "sweep periods"). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.<sup>19</sup> Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.<sup>20</sup> If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percent of diaries from each community surveyed must be approximately the same as the percentage of the total population for each

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<sup>13</sup> For purposes of determining whether to use the network or non-network standard for audience share, the Commission relies on the definition of network and independent station in our rules. Thus, for such purposes, affiliates of the ABC, CBS, and NBC networks are "network stations." See 47 C.F.R. §76.5(j) and (k). Other stations are treated as independent stations for this limited purpose. See 47 C.F.R. §76.5(j); *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17293-34.

<sup>14</sup>47 C.F.R. §76.5(i).

<sup>15</sup> *Id.*

<sup>16</sup>See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

<sup>17</sup>47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

<sup>18</sup>Previously, there was at least one independent research firm that conducted audience surveys for this purpose.

<sup>19</sup>Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

<sup>20</sup>It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

community served by the cable system.<sup>21</sup> In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the over-the-air data that it collects for its routine audience sweep periods, selecting “in-tab” diaries<sup>22</sup> from its database from the area served by a cable system or an individual cable community.<sup>23</sup> It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data pursuant to the requirements set forth in Section 76.54(c) of the Commission’s rules.<sup>24</sup> Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (e.g., a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.<sup>25</sup> Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of unnecessary or misinformed oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged remains the same as for weekly surveys.<sup>26</sup> A petitioner therefore may submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

### III. DISCUSSION

6. WFSB states that it is licensed to a community in the Hartford-New Haven-New Britain-

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<sup>21</sup>47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

<sup>22</sup>In-tab diaries are the number of diaries included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as being unusable. Thus, it is the number of diaries in the sample used to calculate the audience statistics.

<sup>23</sup>We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. This eliminates any doubt that the data provided was provided by Nielsen. See e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

<sup>24</sup>47 C.F.R. § 76.54(c). Section 76.54(c) states that “[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period.”

<sup>25</sup>*Id.*

<sup>26</sup>Section 76.54(b) states that “[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level.”

Waterbury-New London, Connecticut designated market area (“DMA”), while WCBS-TV is licensed to a community in the New York, New York DMA.<sup>27</sup> WFSB argues that it would normally be entitled to assert exclusivity protection against WCBS-TV in Waterbury, New Haven, and Wallingford, but it cannot because WCBS-TV is considered significantly viewed in New Haven County, Connecticut, where the subject communities are located.<sup>28</sup> WFSB maintains, however, that WCBS-TV no longer meets the significantly viewed standard in Waterbury, New Haven, and Wallinford, and, as proof, it submits the results of a special community-specific survey conducted by Nielsen Media Research.<sup>29</sup> WFSB states that Nielsen conducted a community-specific re-tabulation of audience data based on noncable/non-ADS homes for the specified zip codes comprising each.<sup>30</sup> The submitted data include the separate results from two four-week audience sweep periods in each of two years. The first year’s survey audience estimates were based on February 2005 and May 2005 sweep periods, and the second year’s estimates on the February 2006 and May 2006 sweeps periods.<sup>31</sup> These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission’s rules.<sup>32</sup> WFSB states that WCBS-TV’s share of total viewing hours in over-the-air homes in Waterbury, New Haven, and Wallingford, falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

**TABLE 1 – WCBS-TV VIEWING IN WATERBURY**

<u>Survey Year</u> <sup>33</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2005/ May 2005	2	0.0	0.0	0.0	0.0
Feb. 2006/ May 2006	9	0.0	0.0	0.0	0.0

<sup>27</sup>Petition at 3-4.

<sup>28</sup>*Id.* WFSB states that WCBS-TV achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

<sup>29</sup>*Id.* at Exhibit 1.

<sup>30</sup>*Id.* Nielsen Media Research defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. *See* Nielsen Media Research at <http://www.nielsenmedia.com/nc/portal/site/Public/>.

<sup>31</sup>*Id.*

<sup>32</sup>47 C.F.R. § 76.54(b).

<sup>33</sup>The survey dates of February/May 2005 and February/May 2006 meet the criteria set forth in the rules and *KCST-TV, Inc.*, that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

**TABLE 2 – WCBS-TV VIEWING IN NEW HAVEN**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2005/ May 2005	11	0.0	0.0	0.0	0.0
Feb. 2006/ May 2006	10	0.0	0.0	0.0	0.0

**TABLE 3 – WCBS-TV VIEWING IN WALLINGFORD**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2005/ May 2005	8	0.0	0.0	0.0	0.0
Feb. 2006/ May 2006	5	0.0	0.0	0.0	0.0

As a result, WFSB requests that the Commission grant its petition so that it can assert its exclusivity rights in Waterbury, New Haven, and Wallingford, Connecticut.

7. We find that WFSB made the requisite showing to support its petition. As required by the rules, WFSB has provided, for each of the three communities herein, community-specific survey results for WCBS-TV for each year surveyed. In the combined results obtained by Nielsen for the February 2005/May 2005 and February 2006/May 2006 survey periods, the reported individual results for the communities of Waterbury, New Haven, and Wallingford indicate that the share of total viewing hours and net weekly circulation share is zero. For both survey years, the reported shares for WCBS-TV fall below the criteria set forth in Section 76.5(i) of the rules. Accordingly, we find that the submitted audience surveys are sufficient to demonstrate that WCBS-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the communities of Waterbury, New Haven, and Wallingford, Connecticut.

**IV. ORDERING CLAUSES**

8. Accordingly, **IT IS ORDERED**, that the petition filed by Meredith Corporation **IS GRANTED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>34</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>34</sup>47 C.F.R. §0.283.